20194 SERVICE DATE - DECEMBER 3, 1996
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41514

HALLMARK CARDS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: November 25, 1996

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed between 1987 and 1990 by Transcon for Hallmark Cards, Inc. (Hallmark or petitioner). We find that the collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court for the Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Hallmark Cards, Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB-93-02247 DN (referral order dated September 28, 1994). The court stayed the proceeding to enable referral of several issues, including contract carriage, unreasonable practice, and rate reasonableness, to the ICC for determination.

Pursuant to the court order, on December 27, 1994, Hallmark filed a petition for declaratory order requesting the ICC to resolve the issues referred by the court. By decision served January 9, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 10, 1995, petitioner filed its opening statement. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 27, 1995.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

Petitioner asserts that all of the shipments which are the subject of this proceeding[2] were transported by Transcon under its contract carrier permit No. MC-110325 (Sub-No. 205) pursuant to contractual agreements entered into by the parties in May 1987 and June 1989. In the alternative, petitioner maintains that Transcon's efforts to collect the claimed undercharges constitute an unreasonable practice under section 2(e) of the NRA.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged, or that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[3]

DISCUSSION

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

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[2] Petitioner states that there are 919 shipments at issue. These shipments are listed by pro number in Exhibit C3 to petitioner's opening statement. Based on the figures set forth in Exhibit C3, respondent seeks to collect from petitioner $171,773.68, consisting of $123,541.88 in undercharge claims and $49,231.80 in interest.

[3] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e) by its own terms, and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark 1994); North Penn Transfer, Inc. v. Stationers Distributing Co, 174 B.R. 263 (N.D. Ill. 1994); Allen v. National Enquirer, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

[4] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-
(continued...)

It is undisputed that Transcon no longer transports property.[5] Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing negotiations satisfies the section 2(e) standard.

In a declaration attached as Exhibit A to petitioner's opening statement, Jim Werner, manager of corporate transportation for Hallmark, states that he was responsible for the arrangements made with Transcon for the transportation of the subject Hallmark shipments. Mr. Werner testifies that Hallmark and Transcon entered into two written agreements, effective May 1, 1987, and June 21, 1989, respectively, for the furnishing of transportation services at rates specified in the agreements. Copies of the agreements are attached to Mr. Werner's statement.[6] Mr. Werner asserts that the rates contained in the agreements were the product of negotiations between Hallmark and Transcon, that Hallmark tendered its traffic to Transcon based on the representations embodied in the written agreements, and that the

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(...continued)
off date as to proceedings pending as of January 1, 1996.

[5] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

[6] Attached as Exhibit A to the June 21, 1989 agreement is a schedule identified as ICC TCON 866, effective 6/21/89, titled, "CONTRACT SCHEDULE APPLYING ON INTERSTATE AND FOREIGN COMMERCE." The schedule specifically applies to Hallmark and certain of its named subsidiaries (ITEM 500) and sets out rates based on zip code origins to be charged for movements to points in the Kansas City, MO area (ITEM 5000). For inbound collect shipments weighing 19,999 pounds or less from points not covered, the schedule provides for a 50% discount from class rates subject to a minimum charge of $39.00 (ITEM 6000).

freight charges assessed by Transcon and paid by Hallmark conformed with the terms of the agreements.[7]

Attached as Exhibit C1 to petitioner's opening statement is a representative sample of balance due or revised freight bills provided to petitioner by Transcon. The representative sample consists of 11 freight bills relating to shipments transported between June 22, 1989, and March 2, 1990. These bills reflect the original amount billed by Transcon and paid by Hallmark, the interest and undercharge claimed, and the asserted balance due. Of the 11 representative freight bills, 10 contain the assertion that the "original charges were derived from an invalid contract".[8] The representative freight bills, the two transportation agreements, and the contract rate schedule confirm the testimony of Mr. Werner, particularly with respect to the existence of agreed-to negotiated rates, and constitute written evidence of a negotiated rate. We conclude, accordingly, that petitioner has satisfied the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A); (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that negotiated rates were offered to Hallmark by Transcon; that Hallmark tendered freight to Transcon in reliance on the agreed-to rates; that the negotiated rates were billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Hallmark for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

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[7] Mr. Werner, at p. 3 of his declaration, states that Transcon's undercharge claim against Hallmark totals $137,795.81, an amount considerably at variance with the figure stated in n.2. The record provides no explanation for this discrepancy in the amount of total undercharges claimed.

[8] The remaining representative bill re-rates an originally assessed $39.00 minimum charge applied to a 25-pound shipment which moved from Oak Forest, IL, to North Kansas City, MO, points included within the rate schedule (Item 5055).

2. This decision is effective on December 3, 1996.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 93-02247 DN

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary